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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANTEO PELLICONI

Appeal 2010-002805
Application 10/551,679
Technology Center 1700

Before BRADLEY R. GARRIS, PETER F. KRATZ, and
LINDA M. GAUDETTE, *Administrative Patent Judges*.

GAUDETTE, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134(a) from the Examiner's decision[1] finally rejecting claims 1-7 under 35 U.S.C. §102(e) as anticipated by Washiyama (US 6,586,531, issued Jul. 1, 2003).[2] We have jurisdiction under 35 U.S.C. § 6(b).

We REVERSE.

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[1] Final Office Action mailed Jan. 29, 2009("Final").
[2] Appeal Brief filed Jul. 2, 2009 ("Br.").

The independent claims are directed to "[a] masterbatch composition" (claim 1), "[a] thermoplastic polyolefin composition comprising a masterbatch composition" (claim 3), "[a] process for preparing a masterbatch composition" (claim 6), and "[b]umpers and fascia comprising a masterbatch composition" (claim 7). The masterbatch composition is identically claimed in each of the independent claims. (*See* Br. 2-3.) Claim 1 is representative, and is reproduced below from the Claims Appendix to the Appeal Brief:

1. A masterbatch composition comprising (percent by weight):

A) 50%-90% of a crystalline polypropylene component comprising:

A^{I}) from 25% to 75% of a fraction having a melt flow rate MFR^{I} of from 0.1 to 10 g/10 min.; and

A^{II}) from 25% to 75% of a fraction having a melt flow rate value MFR^{II} from 10 to 68g/10 min.;

wherein a ratio MFR^{II} / MFR^{I} is from 5 to 60, and the fractions A^{I}) and A^{II}) are independently selected from the group consisting of a propylene homopolymer, a random copolymer of propylene containing up to 3% of ethylene, and a random copolymer of propylene containing up to 6% of at least one C4-C10 α-olefin; and

B) 10%-50% of a copolymer component comprising ethylene and at least one C_3-C_{10} α-olefin, the copolymer containing from 15% to 50% of ethylene, and optionally minor amounts of a diene;

said masterbatch composition having an MFR and a value of the intrinsic viscosity [η] of a fraction soluble in xylene at room temperature (about 25°C) of at least 3.5 dl/g.

Appellant's arguments raise the following issue for our consideration: did the Examiner reversibly err in finding that Washiyama teaches a masterbatch composition having a crystalline polypropylene component with a fraction A^I) having a melt flow rate MFR^I of from 0.1 to 10 g/10 min., a fraction A^{II}) having a melt flow rate value MFR^{II} from 10 to 68g/10 min., and a ratio MFR^{II} / MFR^I of from 5 to 60?

We answer this question in the affirmative and, therefore, are in agreement with Appellant that the Examiner has failed to establish a prima facie case of anticipation.

The Examiner's rejection is based on a finding that Washiyama

> teaches the production of a masterbatch using crystalline polypropylene of "MFR^I of from 0.5 to 10 g/10 min," present in an amount that embraces the claimed range at 25% to 75%, with a second polymer faction [sic] having MFR^{II} embracing that recited herein at 15 to 100 g/10 min, and present in an amount that embraces the claimed range at 25% to 75%.

(Ans.[3] 3-4.) The Examiner maintains that Washayama "anticipates the invention" because Washayama "teaches ranges for each of the MFR^I, MFR^{II}, MFR^{II} / MFR^I ratio and the compositional limitations that *may*, simultaneously, be the same." (Ans. 6 (emphasis added).)

"The way in which the elements are arranged or combined in the claim must itself be disclosed, either expressly or inherently, in an anticipatory reference." *Therasense, Inc. v. Becton, Dickinson and Co.*, 593 F.3d 1325, 1332 (Fed. Cir. 2010) (citations omitted) ("The mere fact that a certain thing may result from a given set of circumstances is not sufficient." (citations omitted)). In *Atofina v. Great Lakes Chemical Corp.*, 441 F.3d

[3] Examiner's Answer mailed Sep. 14, 2009.

991 (Fed. Cir. 2006), our reviewing court considered the issue of whether claims were anticipated by a reference which disclosed a temperature range of 100 to 500 °C, which was broader than and fully encompassed the claimed range of 330 to 450 °C. In finding that the temperature range disclosed in the reference did not anticipate the claimed range, the court explained "[t]he disclosure is only that of a range, not a specific temperature in that range, and the disclosure of a range is no more a disclosure of the end points of the range than it is of each of the intermediate points." *Id.* at 1000. The court also considered the issue of whether the claims were anticipated by a reference disclosing a 0.001 to 1.0 percent range of a particular component, which overlapped the claimed range of 0.1 to 5.0 percent. In finding the claims were not anticipated, the court explained that

> although there is a slight overlap, no reasonable fact finder could determine that this overlap describes the entire claimed range with sufficient specificity to anticipate this limitation of the claim. The ranges are different, not the same. . . . In addition, the disclosure of a 0.001 to 1.0 percent range is not a disclosure of the end points of that range.

Id.

As conceded by the Examiner, Washiyama does not explicitly disclose an embodiment of a composition wherein the MFR^{I}, MFR^{II}, and the MFR^{II} / MFR^{I} ratio fall within Appellant's claimed ranges. Rather, Washiyama merely discloses ranges for MFR^{I}, MFR^{II}, and the MFR^{II} / MFR^{I} ratio which overlap or encompass Appellants' claimed ranges. We are in agreement with Appellant that "Washiyama do[es] not describe the entire claimed ranges with sufficient specificity to . . . anticipate these limitations" (Br. 4).

Accordingly, we do not sustain the rejection of claims 1-7 under 35 U.S.C. §102(e) as anticipated by Washiyama.

REVERSED

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